For Richer or Poorer: The Warren Court's Relationship to Socioeconomic Class

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Abstract

The U.S. Constitution does not enshrine socioeconomic rights. Why does this matter? Many argue that socioeconomic rights have value in and of themselves because they secure certain minimum conditions of human dignity, but socioeconomic rights also have instrumental value because abject material deprivation often makes traditional political and civil rights meaningless. In this thesis, I explore the relationship between U.S. constitutional law and socioeconomic rights through an analysis of the Warren Court’s decisions regarding socioeconomic class. In Chapter 1, I present existing literature on socioeconomic rights, socioeconomic rights in the American context, and what many scholars see as the Warren Court’s exceptional role in advancing the recognition of constitutional socioeconomic rights. In Chapter 2, I closely examine five Warren Court cases that implicated socioeconomic class and, possibly, socioeconomic rights, and I identify three distinct rights-based arguments related to socioeconomic class advanced by the Court. In Chapter 3, I argue that the Warren Court did not, in fact, come very close to the recognition of constitutional socioeconomic rights but, rather, pursued another important goal, guaranteeing the worth of political and civil rights for people of low socioeconomic class. I also invoke Dworkin’s concept of law as integrity, arguing that an accurate understanding of the Warren Court’s relationship to socioeconomic class shows that the Warren Court advanced integrity in the law. Ultimately, this thesis seeks to correct what I argue are misunderstandings of the Warren Court’s legacy as it relates to rights.
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Chapter 1: Background

Whereas many national constitutions create social and economic rights – even if those rights have limited enforcement – the American Constitution does not. While the American Constitution protects traditional political and civil rights, it establishes no socioeconomic rights or “rights to minimally decent conditions of life.”¹ There is robust scholarship debating the role of socioeconomic rights – sometimes called welfare rights – in national constitutions, and the absence of socioeconomic rights in the American Constitution is a phenomenon many scholars have sought to explain. In this chapter, I define socioeconomic rights and differentiate socioeconomic rights from efforts to guarantee the worth of political and civil rights to people of low socioeconomic status. I also discuss influential scholarship on the absence of socioeconomic rights from the American Constitution and demonstrate that much of this work focuses on the Warren Court as an instance of socioeconomic rights recognition in the American context. In light of existing work, I situate my thesis as an effort to advance a more nuanced understanding of the rights-based arguments related to socioeconomic class made by the Warren Court.

First, it is important to make clear what is meant by socioeconomic rights as I use the term here. Socioeconomic rights typically include the rights to housing, sustenance, education, healthcare, and other goods or services one might deem necessary to provide for someone to live a minimally decent life. Socioeconomic rights are often considered positive rights as opposed to negative rights. As positive rights, socioeconomic rights entail obligations on behalf of the state to undertake actions to provide goods or services to the people. Negative rights are typically understood to be less demanding of the state because they obligate the state to refrain from taking an action or to prevent some individuals from taking actions that would violate others’

negative rights. However, the distinction between positive and negative rights is not unchallenged. Most notably, Stephen Holmes and Cass R. Sunstein argue that all rights – even so-called negative rights – are really positive rights because all rights impose positive obligations on the state to take action and make expenditures to implement, enforce, and adjudicate rights.² Some of the debate regarding whether socioeconomic rights appropriately fall into the scope of national constitutions is based on this distinction between positive and negative rights. Some scholars believe that constitutions are best suited to enshrine negative rights because the purpose of national constitutions is to declare the government’s obligations not to interfere with its people’s rights.³ Others, however, point to numerous constitutions that enshrine positive rights, including socioeconomic rights, constitutions such as South Africa’s or Colombia’s.

Furthermore, it is important to distinguish between two concepts: socioeconomic rights and the guarantee of the worth of political and civil rights for individuals of low socioeconomic status. Socioeconomic rights seek to secure conditions of human dignity by providing for all people bare necessities such as food, water, and shelter. Socioeconomic rights are embedded in Franklin D. Roosevelt’s Second Bill of Rights, the Universal Declaration of Human Rights, and the International Covenant on Economic, Social, and Cultural Rights, documents that each call for the provision of rights that surpass the political and civil rights enumerated in the American Constitution. The Second Bill of Rights, to choose an example from the American context, demands the right to a good education, the right to protections against economic fears associated with age, sickness, accident, and unemployment, the right to medical care, and the right to a

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These are rights that fit squarely with many people’s understanding of welfare rights as they seek to secure a basic standard of comfort for all people. The Second Bill of Rights also calls for rights like the right to “useful and remunerative” employment, the right to a decent living for farmers, and the right of businesses to trade on fair terms of competition unencumbered by monopolies. In Roosevelt’s State of the Union address, he stipulated that these rights were “among” the new rights embraced by the American public, suggesting that there may even be additional socioeconomic guarantees owed to the American people.

While socioeconomic rights are often considered a distinct category of rights, they are not unrelated to political and civil rights. Many argue that political and civil rights are not accessible to people in destitute conditions. For example, a starving person is unlikely to have the means to engage in the political process because she would – understandably – prioritize her survival over exercising her right to vote. Similarly, unhoused people are less likely to be counted by a census and may therefore have their representation diluted. Roosevelt recognized the important impact of socioeconomic rights on political and civil rights. In his State of the Union address, he noted that political and civil rights were “inadequate” without socioeconomic rights. He argued that “true individual freedom cannot exist without economic security and independence” in addition to the traditional political and civil rights afforded to Americans precisely because “necessitous men are not free men.”

Recognizing the connection between socioeconomic conditions and the enjoyment of political and civil rights, some argue for the provision of basic socioeconomic rights to fulfill the

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5 Franklin D. Roosevelt Presidential Library and Museum, “State of the Union.”
6 Franklin D. Roosevelt Presidential Library and Museum, “State of the Union.”
7 Franklin D. Roosevelt Presidential Library and Museum, “State of the Union.”
8 Franklin D. Roosevelt Presidential Library and Museum, “State of the Union.”
promises of political and civil rights. In this way, they depart from an argument advancing socioeconomic rights for the purpose of fulfilling human dignity and shift to an argument instrumentalizing socioeconomic rights as a means to achieve supposedly more important rights of a political and civil nature. Guaranteeing the worth of political and civil rights for individuals of low socioeconomic status differs from both of these approaches. Guaranteeing worthy rights for individuals of low socioeconomic status does not necessarily recognize a new category of rights. It aims to ensure that the poor have access to the political and civil rights they are promised under the existing framework of state obligations. It does not have to do so by creating new state programs that would provide socioeconomic rights.

Like the majority of scholarship on this issue, my thesis starts from the assumption that the United States does not protect socioeconomic rights. However, it is important to note that not all scholars agree on this premise. Some scholars argue that the United States has underenforced commitments and norms that would give rise to socioeconomic protections if fulfilled. Lawrence Sager, for example, argues that “the refusal of a court to give direct remedial effect to one or another obligation of the state does not necessarily signal the absence or the court’s belief in the absence of that obligation from American constitutional law.” 9 Sager’s core insight is that judicial underenforcement is not synonymous with judicial nonrecognition of the constitutional obligation at hand. 10 Frank I. Michelman supports Sager’s notion of judicial underenforcement. 11 Michelman lays out several potential reasons why courts might engage in judicial underenforcement of an obligation they do recognize: lack of justiciable standards for the obligation, reluctance to strain relationships to other branches of government, or reluctance to

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engage in political decision-making. Cass R. Sunstein advances a view similar to Sager’s. Sunstein argues that, whereas people typically distinguish between constitutional requirements and issues of policy, there is also a third relevant category, which he refers to as “constitutive commitments.” Sunstein presents constitutive commitments as widely accepted beliefs that constitute a society’s basic values and hold an influence firmer than policies but less binding than constitutional requirements. He argues that Roosevelt’s Second Bill of Rights served as a set of constitutive commitments.

Other scholars argue that, while the United States seems to lack robust socioeconomic rights on the federal level, subnational entities enumerate and implement robust socioeconomic rights. Gillian MacNaughton and Mariah McGill argue that “governmental entities at the federal, state, and local level already recognize and implement – albeit in nascent stages – international economic and social rights.” According to MacNaughton and McGill, the U.S. Senate’s failure to ratify the International Covenant on Economic, Social and Cultural Rights has not prevented enthusiasm for its goals on the state and city levels. On the state level, MacNaughton and McGill highlight that state constitutions often enshrine socioeconomic rights absent from the U.S. Constitution, state court judges are increasingly receptive to human rights arguments, and state court judges have referenced human rights treaties for interpretive guidance regardless of their ratification status in the United States. On the city level, MacNaughton and McGill highlight

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the rise of human rights cities, which seek to incorporate human rights frameworks into their local policies, pointing to Washington, Boston, and Eugene as early examples of human rights cities in the United States. Sunstein highlights the same phenomenon on the state level, noting that “state constitutions protect [socioeconomic] rights, and some courts are willing to enforce them.”

Among scholarship that begins with the premise that the United States does not recognize or protect socioeconomic rights, many scholars identify potential explanations for the absence of socioeconomic rights in American constitutional law. Here, I entertain some of these explanations. Ultimately, I demonstrate that many scholars seeking to uncover why the United States does not protect socioeconomic rights focus on the Warren Court’s relationship to socioeconomic class.

One possible explanation for the absence of socioeconomic guarantees in the American Constitution is chronological. The chronological rationale credits the age of the American Constitution with the absence of socioeconomic rights. Sunstein presents this view as the belief that the American Constitution was drafted “when constitutions were simply not thought to include social and economic guarantees.” Sunstein clarifies that this view does not contend that the Framers did not care about the conditions of the poor – on the contrary, Sunstein highlights multiple passages in which the Framers, influential thinkers at the time, and classical liberal philosophers that influenced the founding state their commitments to furnishing indigents with basic needs and comforts. Sunstein also presents a counterargument to the chronological

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https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12526&context=journal_articles.
explanation based on the American Constitution’s ability to change over time through amendments or changes in constitutional interpretation. On the counterargument’s view, the time of the American Constitution’s founding cannot explain the fact that the Constitution has not changed to include a commitment to socioeconomic rights. Defenders of the chronological explanation might respond, however, that the American Constitution is difficult to amend – amendments are so difficult to pass that the burden deters efforts to amend the Constitution as well. Nonetheless, it remains notable that even periods of U.S. political history that paid great attention to socioeconomic class – periods like the New Deal Era – have not included significant efforts to amend the Constitution to include socioeconomic rights.

Another possible explanation for the absence of socioeconomic guarantees in the American Constitution is institutional and focuses on the character, goals, and practices of U.S. courts. Sunstein presents the institutional explanation as conceiving of the American Constitution and American courts as pragmatic instruments that exist for the purpose of judicial enforcement. Sunstein distinguishes between pragmatic and aspirational constitutions, where pragmatic constitutions focus on each provision’s impact and potential for enforcement, and aspirational constitutions declare the values and goals of a nation, even if those goals are not enforceable. The institutional rationale cites the difficulty of enforcing socioeconomic rights to explain the hesitance of pragmatic American constitutional law to recognize socioeconomic rights. Sunstein highlights the ability of some state-level constitutions and the South African Constitution to recognize and enforce socioeconomic rights as a counterargument to this claim.

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Sunstein highlights that courts could regard socioeconomic rights as goals that must be treated as legislative priorities even if they are not fully realized. Other scholars point to American exceptionalism to explain the country’s lack of socioeconomic rights. Notably, there is extensive scholarship on American exceptionalism with many competing views: some suggest American culture and politics are exceptional due to widely available upward mobility, some suggest the explanation lies in the absence of feudalism in American history, and some posit that the two-party system prevented socialist political efforts when they were successful elsewhere. All accounts agree, however, that socialism has never had significant political power in the United States, and Sunstein highlights that “the existence of social and economic rights, within a nation’s constitution, is correlated with the strength of socialist or left-wing elements within that nation.” However, Sunstein also argues a compelling counterargument to the American exceptionalism explanation: “a strong socialist movement is neither a necessary nor a sufficient condition for social and economic rights,” and many who are not socialists – people like Roosevelt – advocate for socioeconomic rights within a framework of an otherwise free enterprise capitalist society.

Ganesh Sitaraman also highlights American exceptionalism, specifically the exceptional nature of the U.S. economy, the exceptional conditions under which the U.S. Constitution was drafted and ratified, and the exceptional nature of the U.S. Constitution. Sitaraman notes that, “before the revolution, through the 1780s, and into the early republic, the founding generation recognized that America was exceptional because of its relative economic equality.”

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33 Sitaraman, The Crisis of the Middle-Class Constitution, 15.
describes the founding era as astonishingly equal when compared with England and other western European countries in the eighteenth century.\(^{34}\) Although wealth inequality existed in the founding era, land ownership was far more diffuse in the United States than England at the time, and the American middle class fared better economically than the English middle class at the time.\(^{35}\) Sitaraman argues that this relative economic equality made the conditions under which the U.S. Constitution was drafted and ratified different from the conditions under which previous constitutional efforts had been undertaken because other constitutional efforts had taken place in societies plagued by severe economic inequality. Sitaraman points to the power of economic elites to usurp political power and shows how different economic distributions necessitate different interventions in the effort to create politically equal societies. To articulate this idea, Sitaraman distinguishes between class warfare constitutions and middle-class constitutions. Class warfare constitutions take economic classes and economic inequality as unavoidable aspects of their political communities and create structures to balance the rich’s interests and the poor’s interests through opposition.\(^{36}\) A class warfare constitution could, for example, create two legislative bodies, one comprised of the rich to serve the interests of the rich and another comprised of the poor to serve the interests of the poor. Middle-class constitutions, on the other hand, do not bake economic classes into the structure of the government because they do not take classes to be an innate part of their societies. However, because middle-class constitutions do not have “a formal place for classes built into the design of the government, a middle-class constitution is particularly susceptible to elites’ capturing all the levers of power” if economic equality erodes.\(^{37}\) He describes the U.S. Constitution as a middle-class constitution. While this

\(^{34}\) Sitaraman, *The Crisis of the Middle-Class Constitution*, 61.

\(^{35}\) Sitaraman, *The Crisis of the Middle-Class Constitution*, 67.

\(^{36}\) Sitaraman, *The Crisis of the Middle-Class Constitution*, 33.

characterization cannot explain the absence of socioeconomic rights in the United States, it highlights the importance of certain protections for socioeconomic class in the United States based on the specific vulnerabilities of middle-class constitutions to elite capture.

The final possible explanation for the absence of socioeconomic rights in the United States I will present here is the realist explanation. Sunstein presents the realist explanation as the understanding that “judicial interpretation of the law, including the Constitution, has a great deal to do with the political commitment of the judges.”\(^{38}\) This realist explanation argues that neither the Constitution’s age, nor the character of U.S. courts, nor the distinctive American political culture prevent the United States from recognizing socioeconomic rights. Under the right political circumstances in influential U.S. courts, the United States could recognize robust socioeconomic rights because the interpretation of what the law requires of the state is highly dependent on political affiliation. In his presentation of this possible explanation, Sunstein draws attention to the 1960s and 1970s, in which the Supreme Court issued rulings that “emphatically recognize social and economic rights.”\(^{39}\) He identifies the election of President Nixon in 1968 and the subsequent Supreme Court appointments of political conservatives as the crucial turning point that stopped the Warren Court’s progress toward the recognition of socioeconomic rights.\(^{40}\) Sitaraman also touches on the realist explanation. In line with his view that economic equality is important to the success of middle-class constitutions, Sitaraman argues that people have long identified the danger of increasing economic inequality in the United States. He highlights Roosevelt’s Second Bill of Rights and efforts in the 1960s to constitutionalize socioeconomic

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rights.\textsuperscript{41} He converges with Sunstein insofar as he also attributes clearly political motives to changes in constitutional interpretation and the varying degrees of constitutional recognition for socioeconomic rights over time.\textsuperscript{42} Like Sunstein, Sitaraman frames the Nixon presidency as a turning point, noting that Nixon’s election and his appointment of conservative judges to the Supreme Court brought “the possibility that the Constitution would provide minimal protections for the poor … to an end.”\textsuperscript{43}

Unlike much of the work mentioned here, my thesis does not attempt to establish a causal argument as to why the United States lacks socioeconomic rights. Recognizing the absence of socioeconomic rights in the United States, and drawing upon existing work’s focus on the Warren Court in the 1960s and its progress toward the recognition of socioeconomic rights in a U.S. constitutional context, my thesis aims to investigate and provide a more nuanced understanding of the relevant cases from that period. Based on existing literature, which often seeks to characterize the Warren Court as recognizing, almost recognizing, or having had the opportunity to recognize socioeconomic rights, I expected to find compelling assertions of constitutional socioeconomic rights in Warren Court jurisprudence. However, as my analysis of the Warren Court’s relationship to socioeconomic class reveals, the Warren Court was not as radical in its progress toward socioeconomic rights as many scholars seem to argue. Where much of the literature sees progress toward recognizing socioeconomic rights in an American constitutional context, my thesis points to progress toward securing the worth of traditional political and civil rights for those of low socioeconomic status. In arguing that the Warren Court did not recognize socioeconomic rights in the context of American constitutional law, I am not

\textsuperscript{41} Sitaraman, \textit{The Crisis of the Middle-Class Constitution}, 201; Sitaraman, \textit{The Crisis of the Middle-Class Constitution}, 213.
\textsuperscript{42} Sitaraman, \textit{The Crisis of the Middle-Class Constitution}, 213.
\textsuperscript{43} Sitaraman, \textit{The Crisis of the Middle-Class Constitution}, 213.
suggesting that the Warren Court did not conduct important work that greatly expanded the rights of the American poor. In fact, as the cases I analyze demonstrate, the Warren Court handed down decisions that increased the worth of political and civil rights for the poor. In Chapter 3, I argue that the portrayal of the Warren Court as recognizing and enforcing socioeconomic rights incorrectly casts the Warren Court as potentially violating Dworkin’s principle of law as integrity. I argue that an accurate understanding of the Warren Court – one that frames the Court as guaranteeing the worth of traditional rights for the poor instead of one that frames the Court as establishing American constitutional socioeconomic rights – allows us to see that the Warren Court embraced law as integrity instead of violating it. The thrust of my thesis is that, while the Warren Court did not recognize socioeconomic rights, it did attend to the impact of socioeconomic conditions on the functioning of the U.S. government and its political and civil rights. In this way, the Warren Court’s jurisprudence on socioeconomic class aligned with Sitaraman’s insight that the middle-class constitutions like the American Constitution are particularly vulnerable to political inequality if economic inequality is not addressed.
Chapter 2: The Warren Court and Socioeconomic Class

The Warren Court is best known for its role in the rise of judicial activism. It is also lauded for its contributions to criminal procedure and its role in desegregation. In this chapter, I aim to elucidate the Warren Court’s role in the advancement of rights-based arguments surrounding socioeconomic class. I present five cases – Griffin v. Illinois, Douglas v. California, Gideon v. Wainwright, Harper v. Virginia State Board of Elections, and Shapiro v. Thompson – to demonstrate the significance of the Warren Court’s opinions regarding poverty and its relationship to various constitutional rights. Taking inventory of these cases, I draw out important differences in the legal reasoning that undergird the cases. In doing so, I hope to show that, while “rights language” pervades the Warren Court’s discussion of socioeconomic class, it does not necessarily amount to the recognition of constitutional guaranteed socioeconomic rights. This chapter first presents the selected cases, considering the facts of each case, relevant precedent or briefs, and arguments made by majority, concurring, and dissenting opinions. Then, the chapter identifies and elaborates on three distinct arguments put forth by the Warren Court in these cases.

Griffin v. Illinois (1956)

Griffin v. Illinois considered an Illinois law regarding indigent defendants’ right to appeal. At the time, Illinois law granted the right of review by writ of error to every person convicted in a criminal trial. However, full appellate review required convicted persons to

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46 Griffin v. Illinois, 351 U.S. 12, 12 (1956)
provide appellate courts with documentation that was difficult or impossible to prepare without stenographic transcripts of their trial proceedings.\textsuperscript{47} The state of Illinois only provided these transcripts to indigent convicts free of charge if they were sentenced to death; in all other cases, convicts had to purchase transcripts for themselves if they wished to mount an appeal.\textsuperscript{48} The petitioners in \textit{Griffin}, Judson Griffin and James Crenshaw, were convicted of armed robbery, which did not carry the death penalty, and they lacked sufficient funds to purchase a stenographic transcript of their trial.\textsuperscript{49} Under the Illinois Post-Conviction Hearing Act, the state of Illinois had a pathway for indigent convicts to appeal their outcomes based on state or federal constitutional questions, but this pathway did not allow indigent convicts to appeal their outcomes if, like the petitioners in \textit{Griffin}, they believed nonconstitutional errors resulted in their conviction.\textsuperscript{50} Griffin and Crenshaw alleged that their poverty prevented their access to appellate review and claimed that this constituted a violation of their constitutional rights to due process and equal protection.\textsuperscript{51} Their claims were rejected at the state level before being argued before the Supreme Court in 1955 and decided in 1956.

The opinion of the Court, written by Justice Black, held that Griffin and Crenshaw’s constitutional rights to due process and equal protection had been violated. Assuming that the nonconstitutional errors alleged by petitioners would have merited reversal had the petitioners not been too poor to buy a stenographic transcript,\textsuperscript{52} the Court’s sole question was whether due process or equal protection was violated by Illinois law.\textsuperscript{53} The opinion recognized the important challenge of providing “equal justice for poor and rich” and stated that the Constitution’s

\begin{itemize}
\item \textsuperscript{47} \textit{Griffin v. Illinois}, 351 U.S. 12, 12 (1956)
\item \textsuperscript{48} \textit{Griffin v. Illinois}, 351 U.S. 12, 12 (1956)
\item \textsuperscript{49} \textit{Griffin v. Illinois}, 351 U.S. 12, 12 (1956)
\item \textsuperscript{50} \textit{Griffin v. Illinois}, 351 U.S. 12, 12 (1956)
\item \textsuperscript{51} \textit{Griffin v. Illinois}, 351 U.S. 12, 12 (1956)
\item \textsuperscript{52} \textit{Griffin v. Illinois}, 351 U.S. 12, 16 (1956)
\item \textsuperscript{53} \textit{Griffin v. Illinois}, 351 U.S. 12, 16 (1956)
\end{itemize}
guarantees of due process and equal protection “allow no invidious discriminations between persons and different groups of persons.” The Court asserted that no one would think it constitutional to deny people unable to pay court costs the right to plead not guilty or defend themselves in court because “such a law would make the constitutional promise of a fair trial a worthless thing.” Under such a law, the Court recognized, the right to be heard and the right to counsel would be “meaningless promises” to poor citizens. The Court recognized the importance of socioeconomic status alongside other suspect classifications, stating that, “in criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color.” Then, drawing an analogy between the right to defend oneself in court and the right to appellate review, the opinion argued that states cannot deny appellate review to defendants on the basis of their ability to pay court fees.

The opinion acknowledged that the Constitution does not mandate that states grant defendants the right to appellate courts or appellate review. The Court argued, however, that a state that does grant appellate review cannot do so in a way that discriminates against people on the basis of poverty. In Illinois, appellate review was an established norm, and appeals were perceived to finally adjudicate the guilt or innocence of a defendant. In the Court’s view, in all stages of criminal proceedings, due process and equal protection protect indigent defendants from this kind of discrimination. The Court ruled that Illinois’ withholding of appellate review from indigent defendants violated the defendants’ constitutional rights, but the Court did not mandate that Illinois rectify the situation by purchasing stenographic transcripts for all

54 Griffin v. Illinois, 351 U.S. 12, 16-17 (1956)
55 Griffin v. Illinois, 351 U.S. 12, 17 (1956)
56 Griffin v. Illinois, 351 U.S. 12, 17 (1956)
57 Griffin v. Illinois, 351 U.S. 12, 17 (1956)
58 Griffin v. Illinois, 351 U.S. 12, 18 (1956)
59 Griffin v. Illinois, 351 U.S. 12, 18 (1956)
defendants. Rather, the Court urged Illinois to ensure that indigent defendants have access to appellate review, possibly by not including costly stenographic transcripts as required documents in petitions for appellate review on nonconstitutional issues.60

More can be said about the opinion of the Court’s stance on socioeconomic class as a factor that cannot impact one’s access to rights, specifically to the right of appellate review. In a footnote, the opinion of the Court addressed dissenters’ view that Illinois’ practices should be upheld because they apply “to rich and poor alike.”61 The dissenting opinion written by Justices Burton and Minton, with whom Justices Reed and Harlan joined, argued that “Illinois does not deny equal protection to convicted defendants when the terms of appeal are open to all, although some may not be able to avail themselves of the full appeal because of their poverty.”62 The opinion of the Court rejected the dissenters' argument because a facially nondiscriminatory law can be “grossly discriminatory in its operation.”63 The Court cited Guinn v. United States as an example of this principle in action: the Court struck down the Oklahoma Constitution’s grandfather clause as discriminatory against black Americans although the clause was facially nondiscriminatory.64 While one could claim that the grandfather clause in Oklahoma’s Constitution applied to white and racial minority populations alike, the grandfather clause was struck down because it operated with clearly discriminatory impacts. Drawing an analogy between Guinn and Griffin, the opinion of the Court argued that Illinois’ practices should be struck down as well due to their clearly discriminatory outcomes. Importantly, this analogy relies on the similar nature of race and poverty. Before Griffin, race and poverty were not commonly

60 Griffin v. Illinois, 351 U.S. 12, 20 (1956)
61 Griffin v. Illinois, 351 U.S. 12, 17 (1956)
62 Griffin v. Illinois, 351 U.S. 12, 29 (1956)
63 Griffin v. Illinois, 351 U.S. 12, 17 (1956)
64 Griffin v. Illinois, 351 U.S. 12, 17 (1956)
viewed by Courts as similar in their role in abridging substantive access to one’s rights. As Bussiere highlights, *Griffin* was the first time a formally equally but substantively unequal law had been invalidated in a “nonrace case” by the Supreme Court.65

The dissent in *Griffin* argued that the Illinois law did not violate the due process clause because the state could deny the right to appeal in criminal cases altogether without denying due process of law.66 In the dissenters’ view, to allow appeals but with “some differences among convicted persons as to the terms upon which an appeal is exercised” presented potential questions of equal protection but none of due process.67 Regarding equal protection, the dissenters argued that the distinction created by the Illinois law was not one of rich and poor convicts but rather one of those convicted of capital and noncapital offenses, a “universal” distinction in criminal justice because of the finality of a capital conviction.68 In this way, the dissent framed the distinction as a reasonable one for a legislature to make in designing a system of criminal justice.

**Douglas v. California (1963)**

In *Douglas v. California*, the Supreme Court took up a California practice under which state appellate courts could deny indigents’ requests for the appointment of counsel in appeals if they determined, based on their review of case records, that the appointment of counsel would not advantage the indigent or help the appellate court.69 The Supreme Court held the practice unconstitutional as a violation of the Fourteenth Amendment. In *Douglas v. California*, petitioners Bennie Will Meyes and William Douglas were jointly tried with 13 felonies by a

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California court.70 The two were assigned one public defender.71 In court, this public defender moved for a continuance, citing his unpreparedness for the complicated case, noting the conflict of interest he faced in defending both Meyes and Douglas, and requesting that the two be appointed separate counsel.72 When this motion was denied, Meyes and Douglas dismissed the public defender, again requesting that they receive separate counsel.73 These motions were denied, and they were both convicted. Meyes and Douglas appealed their convictions, requesting counsel on appeal, but these requests were denied because the California District Court of Appeal concluded that counsel would not benefit them or the appellate court, and their convictions were affirmed on appeal.74

The opinion of the Court in *Douglas* drew parallels between the case and *Griffin*, stating that “in either case the evil is the same: discrimination against the indigent.”75 The opinion of Court characterized California as affording people different types of appeal based on whether or not they can pay for the assistance of counsel, highlighting that an appellant who cannot afford to hire counsel must have the merits of his case prejudged with only the written text of the record to speak for him, whereas an appellant who can hire counsel has the “full benefit of written briefs and oral argument by counsel.”76 Given this disparity, the Court concluded that the practice drew an unconstitutional line between the rich and poor, leaving the poor with “the right to a meaningless ritual” where the rich have a “meaningful appeal.”77

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Justice Clark’s dissent argued against the majority’s analogous treatment of *Griffin* and *Douglas*. Clark’s dissent noted that the holding in *Griffin* did not mandate that courts provide indigents with stenographic transcripts for free but rather allowed that courts could find other ways of affording indigents adequate and effective access to appellate review. In Clark’s view, the practices of California’s appellate courts achieved this standard: while California did not automatically appoint counsel for indigent appellants, appellate courts inspected the record to determine whether appointing counsel for indigent appellants requesting counsel would be worthwhile, thereby facilitating indigents’ access to appellate review. Clark characterized appointing counsel on appeal as a “useless gesture” in cases in which an independent review of the record indicates counsel would not benefit the appellant or the appellate court, and argued that this process violated neither due process nor equal protection. Clark also identified what he viewed as a troubling “new fetish for indigency” arising on the Supreme Court, raising concerns that this preoccupation over indigents would burden judicial machinery across the states.

Justice Harlan’s dissent, joined by Justice Stewart, characterized the opinion of the Court as relying primarily on the equal protection clause and secondarily on the due process clause — notably the opinion of the Court itself did not specifically reference either clause but rather framed the California practice as “lacking the equality demanded by the Fourteenth Amendment.” Harlan’s dissent argued that the equal protection clause is not applicable to *Douglas*: while the equal protection clause prohibits states from discriminating between the rich and the poor in the formulation and application of laws, it does not prohibit states from

implementing neutral laws that “may affect the poor more harshly than [they do] the rich.”\textsuperscript{82} In this way, Harlan’s dissent echoed the disagreement over facially neutral laws with disparate impact on the poor that divided the majority and dissenters in \textit{Griffin}. Harlan also departed from the majority’s understanding of the classification created by California’s practices. He framed the classification as a rational distinction between appellants whose appeal cases have merit and appellants launching frivolous appeals. Based on this understanding, Harlan justified the classification as one with a rational basis rather than as one that divides individuals seeking to exercise rights on the basis of wealth. Harlan also argued that no state could ever “satisfy an affirmative duty – if one existed – to place the poor on the same level as those who can afford the best legal talent available.”\textsuperscript{83}

Having disputed the Court’s invocation of the equal protection clause, Harlan addressed due process. He noted that the Fourteenth Amendment does not require states to conduct appellate review, which means that the only question rightfully before the court is whether the state’s processes are so arbitrary and unreasonable that they merit invalidation. In Harlan’s view, the state’s processes do not merit invalidation because the rules actually provide indigents the benefit of expert appraisal of their appeals’ merits.\textsuperscript{84} Harlan also argued against invalidating the state’s processes because California’s processes mirror the processes used by the Supreme Court and many appellate courts.\textsuperscript{85}

\textit{Gideon v. Wainwright} (1963)

In \textit{Gideon v. Wainwright}, the Supreme Court concluded that the Sixth and Fourteenth Amendments entitle any American accused of a crime to legal counsel. Clarence Earl Gideon

\textsuperscript{82} \textit{Douglas v. California}, 372 U.S. 353, 361 (1963)
\textsuperscript{83} \textit{Douglas v. California}, 372 U.S. 353, 363 (1963)
\textsuperscript{84} \textit{Douglas v. California}, 372 U.S. 353, 365-366 (1963)
was charged with the felony of breaking and entering with intent to commit a misdemeanor in Florida. Gideon had an eighth-grade education and had spent his early adult life as a drifter, so he lacked means to hire legal representation. At trial, he asked the judge presiding over his case to appoint counsel for him because he could not hire one himself. The judge denied his request, explaining that the state of Florida only appoints counsel for criminal defendants in capital cases. Having had his request for counsel denied, Gideon proceeded to represent himself, made an opening statement, cross-examined witnesses, presented his own witnesses, and argued for his innocence. The jury found Gideon guilty. He was sentenced to five years in prison. Gideon filed a petition for writ of habeas corpus in the Florida Supreme Court, challenging his conviction on the grounds that the judge had denied him a constitutional right to have legal representation, but the Florida Supreme Court denied this petition. Gideon persisted, filing a handwritten petition in the United States Supreme Court. The Supreme Court granted certiorari in order to revisit the issue of legal representation for the indigent.

The Supreme Court’s consideration of Gideon v. Wainwright also served as a review of the Court’s earlier ruling in Betts v. Brady, and the Court specifically requested both parties in Gideon to discuss whether Betts should be reconsidered in their briefs and oral arguments. Therefore, it is relevant to briefly recap the Court’s holding in Betts. Betts was similar to Gideon in many ways. Smith Betts was indicted for a robbery in a Maryland state court. Betts told his

87 U.S. Courts, “Facts and Case Summary - Gideon.”
89 U.S. Courts, “Facts and Case Summary - Gideon.”
90 U.S. Courts, “Facts and Case Summary - Gideon.”
91 Gideon v. Wainwright, 372 U.S. 335, 338 (1963)
92 Gideon v. Wainwright, 372 U.S. 335, 338 (1963)
trial judge that he lacked funds to hire a lawyer and requested that one be appointed for him. 93 His request was denied because the state of Maryland only appointed counsel for indigent defendants in murder and rape cases. 94 Betts defended himself in much the same way Gideon did, cross-examining witnesses and summoning his own witnesses. 95 He was found guilty and sentenced to eight years in prison. Betts filed a writ of habeas corpus, alleging that his denied access to legal representation violated the Fourteenth Amendment, but his plea was denied. 96 Upon review, the Supreme Court affirmed the ruling, holding “that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment.” 97

Betts argued that the Sixth Amendment right to counsel, which had been construed to mean “that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived,” 98 extended to indigent defendants in state courts due to the Fourteenth Amendment. The Court responded that the right of indigent defendants to appointed counsel would only have been extended to the state level if it constituted “a rule so fundamental and essential to a fair trial, and so, to due process of law” that it would be required of states by the Fourteenth Amendment. 99 The Court concluded in Betts that “appointment of counsel is not a fundamental right, essential to a fair trial.” 100 Disagreement over this key claim is the crux of the Court’s decision to overrule Betts in favor of Gideon.

93 Gideon v. Wainwright, 372 U.S. 335, 338 (1963)
94 Gideon v. Wainwright, 372 U.S. 335, 338 (1963)
95 Gideon v. Wainwright, 372 U.S. 335, 338 (1963)
96 Gideon v. Wainwright, 372 U.S. 335, 339 (1963)
97 Gideon v. Wainwright, 372 U.S. 335, 339 (1963)
100 Gideon v. Wainwright, 372 U.S. 335, 340 (1963)
Justice Black delivered the opinion of the Court in *Gideon*. Like the Court in *Betts*, he grounded his opinion in analysis of the Sixth and Fourteenth Amendments. He accepted the framing established in *Betts* that, if the right to counsel for an indigent criminal defendant is a fundamental right essential to a fair trial, then the Fourteenth Amendment requires appointment of counsel in state courts.\(^\text{101}\) He stated that the Court has in many cases considered whether a Bill of Rights right is of fundamental status in order to determine whether the Fourteenth Amendment makes it obligatory on the state governments.\(^\text{102}\)

Within his framework, Justice Black’s task was to prove that the right to counsel is a fundamental right. He made two main types of arguments to support this conclusion: first, he argued that Supreme Court precedent, properly read, affirms that the right to counsel is a fundamental right; second, he argued that a right to fair trial is a worthless right without the right to appointed legal counsel. He asserted that, before *Betts*, the Court had already characterized the right to counsel as fundamental in *Powell v. Alabama*.\(^\text{103}\) He highlighted that *Powell’s* conclusion was subsequently reaffirmed, citing the following passage from *Grosjean v. American Press Co.*:

> “We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.”\(^\text{104}\)

He also pointed to *Johnson v. Zerbst*, which characterized the assistance of counsel as “necessary to insure fundamental human rights of life and liberty.”\(^\text{105}\)

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\(^\text{101}\) *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963)  
\(^\text{102}\) *Gideon v. Wainwright*, 372 U.S. 335, 342-343 (1963)  
\(^\text{103}\) *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963)  
\(^\text{104}\) *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963)  
\(^\text{105}\) *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963)
Grosjean, Johnson, and other precedent, Black elucidated a decade of jurisprudence to support his claim that access to counsel constitutes a fundamental right that should therefore be extended to the state level through the Fourteenth Amendment.

More relevant to my project, however, is Black’s second argument that the right to a fair trial is worthless if the right to counsel is not guaranteed. Black argued that the right to counsel is core to the country’s ability to secure a “fair system of justice.” He stated plainly that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” This statement suggests Black’s belief that poor defendants do not really enjoy the right to fair trial if they are consistently denied the appointment of legal representation. He explained why, stating that the right to be heard – the right to plead innocent in court before a jury – would be “of little avail” if it did not include the right to counsel. He suggested that no ordinary person could be expected to launch a competent defense in court and that innocent laymen risk conviction solely due to unfamiliarity with the law. Essentially, Black recognized the right to counsel as a fundamental piece of one’s ability to make use of one’s right to a fair trial. Without the affirmative right to counsel, one’s right to be heard and defend oneself is an ineffective attempt at justice because one will not have the skills or knowledge to make use of one’s right to be heard or defend oneself. In other words, without the affirmative right to counsel, one cannot have a fair trial.

This review of the rights-based arguments made in support of Gideon must also include the many amicus briefs filed on the petitioner’s behalf. At Walter Mondale’s urging, 22 state

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106 Gideon v. Wainwright, 372 U.S. 335, 344 (1963)
107 Gideon v. Wainwright, 372 U.S. 335, 344 (1963)
attorneys general filed *amicus* briefs supporting Gideon’s claims.109 According to Green, the attorneys general made four main arguments against *Betts*’ precedent: that its approach is contrary to the historical development of the right to counsel, that it “makes the quality of criminal justice dependent on the accused’s ability to pay for it,” that it is incapable of consistent judicial application, and that the burden of providing counsel for criminal cases could be managed by the bench and bar.110 The second argument – that, without the provision of counsel, one’s access to justice is determined by one’s ability to pay for justice – echoes other arguments raised to and by the Warren Court in the cases I review here – arguments that suggest that the degree of enjoyment of a constitutional right varies with the degree of poverty or wealth of an American. The American Civil Liberties Union and the Florida Civil Liberties Union also filed an *amicus* brief in support of Gideon’s argument, in which they argued that “a criminal trial without a defense lawyer… is not a hearing” because no attempt to ascertain guilt or innocence is “meaningful in the absence of a defense lawyer.”111 Unlike the state attorneys’ general briefs, which seem to highlight the existence of a spectrum of ability to exercise constitutional rights related to criminal justice based on one’s socioeconomic status, this brief supported the view that a right to trial is worthless without a defense lawyer.


*Harper v. Virginia State Board of Elections* considered the constitutionality of the poll tax in Virginia state elections. The case was initiated through suits by Virginia residents. The District Court dismissed the complaints, citing *Breedlove v. Sultes*, which upheld a Georgia state law

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requiring the payment of a poll tax as a condition of voting.\textsuperscript{112} Therefore, \textit{Harper} also served as a revisitation of \textit{Breedlove}.

The opinion of the Court acknowledged that, while the right to vote in federal elections is explicitly enumerated in the Constitution, the right to vote in state elections is implicit.\textsuperscript{113} However, the opinion of the Court asserted that, once the franchise in state elections is granted, it cannot be provided discriminately.\textsuperscript{114} In other words, the right to suffrage in state elections is subject to state standards that do not violate equal protection.\textsuperscript{115} The opinion argued that the poll tax conducted unacceptable discrimination on the basis of wealth classifications.\textsuperscript{116} Furthermore, the Court framed the right of suffrage in state elections as a fundamental right, citing \textit{Reynolds v. Sims}.\textsuperscript{117} The Court acknowledged the state’s potential interest in creating qualifications for voters that are germane to their ability to vote but concluded that wealth has no relation to voter qualifications and that the right to vote is too fundamental to be unduly burdened by a poll tax.\textsuperscript{118}

Justice Black’s dissent denounced the Court’s departure from its ruling in \textit{Breedlove}. Black framed \textit{Breedlove} as a unanimous decision to uphold Georgia’s right to make poll tax payments a prerequisite to state voting that had specifically rejected contentions that the law violated equal protection.\textsuperscript{119} In \textit{Breedlove}, the Court specifically recognized that poll tax “collection from all would be impossible for always there are many too poor to pay,” acknowledging the increased burden a poll tax poses to indigent voters without deeming this fact a violation of equal protection.\textsuperscript{120} Black’s dissent argued in favor of \textit{Breedlove}’s interpretation of

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\textsuperscript{120} \textit{Harper v. Virginia State Board of Elections}, 383 U.S. 663, 671 (1966)
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the equal protection clause and argued that the equal protection clause should not be construed as
a principle automatically violated by any policy that results in different treatment of different
groups.\textsuperscript{121} In this way Justice Black’s dissent contributes to ongoing disagreement on the Court
about facially neutral laws with disparate impacts on different groups, a disagreement prevalent
in both \textit{Griffin} and \textit{Douglas}. Furthermore, Black accused the majority of invoking a
“natural-law-due-process formula, under which courts make the Constitution mean what they
think it should at a given time.”\textsuperscript{122}

The dissent written by Justice Harlan and joined by Justice Stewart framed the opinion of
the Court as a departure from norms regarding the application of the equal protection clause.
Harlan’s dissent argued that the equal protection clause prevents states from arbitrarily treating
different people differently and that differential treatment was only deemed arbitrary if not based
on an appropriate differentiating classification.\textsuperscript{123} Under this view, different people face different
conditions, and these conditions may impact how neutral policies burden them, but the equal
protection clause does not require the state to ensure the equal treatment of all people in spite of
their different conditions. Harlan’s dissent argued that there are rational arguments to be made in
favor of a poll tax, including the argument that minimal poll taxes promote civic responsibility
by ensuring that voters care enough about politics to pay the fee.\textsuperscript{124} In this way, Harlan’s dissent
framed one’s ability to pay a poll tax as an indicator of one’s enthusiasm for voting, where one’s
enthusiasm for voting could be deemed a legitimate qualification to vote in state elections.
Harlan acknowledged that such arguments are not aligned with contemporary egalitarian views,

\textsuperscript{121} Harper v. Virginia State Board of Elections, 383 U.S. 663, 672 (1966)
\textsuperscript{122} Harper v. Virginia State Board of Elections, 383 U.S. 663, 675 (1966)
\textsuperscript{123} Harper v. Virginia State Board of Elections, 383 U.S. 663, 681 (1966)
but asserted that arguments that have historically been perceived as rational must not be cast as irrational and invidious by the Court solely due to a change in ideology over time.

*Shapiro v. Thompson (1969)*

In *Shapiro v. Thompson*, the Supreme Court ruled that one-year waiting periods for new state residents to receive welfare benefits are unconstitutional. The decision affirmed three District Court rulings holding waiting periods in Connecticut, Pennsylvania, and the District of Columbia unconstitutional. Connecticut, Pennsylvania, and the District of Columbia had statutory provisions denying welfare assistance to residents that met all program eligibility requirements except that they had not lived in the jurisdiction for at least a year before applying for welfare assistance. Appellees contended that this “prohibition of benefits to residents of less than one year creates a classification which constitutes an invidious discrimination denying them equal protection.”

Appellants – the governments implementing these one-year waiting periods – argued for waiting periods’ necessity in preserving the fiscal integrity of public assistance programs and justified waiting periods as a permissible attempt to deter indigent persons from moving into new jurisdictions solely to access welfare benefits. Some appellants also argued that waiting periods facilitated the states’ ability to plan welfare budgets, minimize fraudulent receipt of welfare benefits from more than one jurisdiction, and encourage new residents to enter the labor force.

The case regarding Connecticut’s one-year waiting period involved appellee Vivian Marie Thompson, who applied to the Aid to Families with Dependent Children (AFDC) program. Thompson was a pregnant 19-year-old unwed mother with a child who changed her

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125 Shapiro v. Thompson, 394 U.S. 618, 627 (1969)
126 Shapiro v. Thompson, 394 U.S. 618, 628 (1969)
127 Shapiro v. Thompson, 394 U.S. 618, 634 (1969)
residence to Hartford, Connecticut, to live with her mother. Her AFDC application was denied on the sole ground that she had not lived in the state for a year before filing her application. According to the opinion of the Court in Shapiro, the District Court had rejected Connecticut’s waiting period as unconstitutional because the waiting period had “a chilling effect on the right to travel.” The opinion of the Court in Shapiro also highlighted that the District Court held that the waiting period violated equal protection because it denied new residents in the state of Connecticut relief in the pursuit of no permissible purpose.

In the District of Columbia case, appellees had been denied aid from the AFDC and Aid to the Permanently and Totally Disabled programs on the ground that applicants had not resided in the District of Columbia for one year before applying for aid. Appellee Harrell had moved from New York to D.C. to live with family because she suffered from cancer. Appellee Barley was a former resident of D.C. who returned to D.C. shortly before being committed to a hospital for mental illness and whose release from the hospital depended on her securing welfare. Appellee Brown had lived in D.C. as a child and had moved with two of her children back to D.C. where one of her children was already living with the child’s father. Finally, appellee Legrant moved with her children to D.C. to live with her sister and brother as she was pregnant and suffering from ill health. According to the opinion of the Court in Shapiro, the District Court consolidated these cases and held the one-year residency requirement was “unconstitutional as a denial of the right to equal protection.”

131 Shapiro v. Thompson, 394 U.S. 618, 624 (1969)
132 Shapiro v. Thompson, 394 U.S. 618, 624 (1969)
133 Shapiro v. Thompson, 394 U.S. 618, 624 (1969)
In the Pennsylvania case, appellees Smith and Foster were denied AFDC aid on the sole ground of not being residents in Pennsylvania for one year preceding their applications. Smith and her five children moved to Pennsylvania, where Smith’s father lived and supported the family until he lost his job. Foster had lived in Pennsylvania from 1953 to 1965, left the state for two years, then returned to Pennsylvania. According to the opinion of the Court in Shapiro, the District Court held Pennsylvania’s waiting period unconstitutional because it violated equal protection, establishing a classification without a rational basis or legitimate purpose.\footnote{Shapiro v. Thompson, 394 U.S. 618, 625 (1969)}

According to the court in Shapiro, the District Court majority also stated that an intention to prevent interstate movement of indigent people or force indigents migrating into a state to promptly leave would be improper and impermissible to implement.\footnote{Shapiro v. Thompson, 394 U.S. 618, 626 (1969)}

Having laid out the District Court decisions before the Supreme Court, the opinion of the Court emphasized the importance of freedom of movement. The opinion of the Court stressed that the nature of the Union and the constitutional concept of personal liberty “require that all citizens be free to travel throughout the length and breadth of our land uninhibited.”\footnote{Shapiro v. Thompson, 394 U.S. 618, 626 (1969)} The opinion cited the Passenger Cases:

“For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”\footnote{Shapiro v. Thompson, 394 U.S. 618, 630 (1969)}
Furthermore, the opinion cited *United States v. Guest*, which states that the constitutional right to interstate travel “occupies a fundamental position fundamental to the concept of our Federal Union” as “a right that has been firmly established and repeatedly recognized.” The opinion argued that one-year waiting periods for welfare programs serve the primary purpose to “chill the assertion of constitutional rights” by deterring indigents from exercising their right to interstate travel or penalizing indigents who do exercise this right by denying them welfare benefits. The opinion of the Court noted that the waiting periods are not tailored to fit the other purposes appellants cite, purposes such as fiscal integrity of welfare programs or preventing fraudulent receipt of welfare benefits. In the face of the long standing right to interstate travel, the opinion argued that the appellants’ stated reasons cannot justify the classification between rich and poor created by welfare program waiting programs. Furthermore, the opinion of the Court argued, the classification cannot be justified as a way to distinguish between residents on the basis of historical contributions to the community as this, too, violates equal protection since jurisdictions cannot apportion benefits on the basis of past tax contributions.

The opinion of the Court drew parallels between welfare programs and other services provided by the state. Where appellants sought to defend the classification as a way to distinguish between residents who have contributed more to the community over time and residents who have not, the opinion argued that this reasoning would similarly permit jurisdictions from barring new residents from using public schools, parks, libraries, or police and fire protection. Because equal protection would not allow for the prohibition of new residents’

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use of these services, neither does it allow for the prohibition of new residents’ use of welfare programs. The grouping of welfare programs with these other services – schools, parks, libraries, and emergency services – merits further analysis. Whereas welfare programs are not typically conceived of as part of American citizens’ rights, education often is. While both might be considered positive rights rather than traditional negative rights, public education is perceived as an entitlement in the United States. Furthermore, emergency services like police and fire protection are also perceived as entitlements in the United States. Parks and libraries are public services often provided by the state, but they are likely considered to belong to the rights of the American citizen to a lesser degree. Grouping welfare programs with these other state services serves to elevate their importance and status to that of public education and emergency services.

The opinion of the Court also stressed that the invidious distinction between needy families who have lived in the jurisdiction for a year or more and needy families that are new to the jurisdiction grants first class status to the former group and second class status to the latter group. Then, on the basis of this distinction, second class families are not granted “the very means to subsist – food, shelter, and other necessities of life.” However, it was not the right to subsist that the opinion of the Court recognized as fundamental. The subsistence implications of waiting periods merely add to the heightened threat posed to the fundamental right to interstate travel. According to Kurland, “never before or since has the Court been so close to creating a constitutional right to welfare assistance as it did in Shapiro v. Thompson.” Furthermore, Bussiere argues that Justice Brennan’s characterization of welfare benefits as “the very means to subsist” was his encouragement of the view that Shapiro was really based on the right to welfare

147 Shapiro v. Thompson, 394 U.S. 618, 627 (1969)
rather than the right to interstate travel.\textsuperscript{150} Despite speculation surrounding the true motives behind the majority opinion, \textit{Shapiro} has not been construed by subsequent interpretations to hold that the right to welfare exists or occupies a fundamental role.

One more facet of the majority opinion merits analysis here: what specific classification did the majority opinion strike down? Was it a classification between the rich and the poor, a “wealth-discrimination doctrine” as Bussiere calls it, or was it a classification between the in-group of long-term residents and the out-group of migrants and new residents?\textsuperscript{151} \textit{Griffin v. Illinois, Douglas v. California, and Harper v. Virginia State Board of Elections} had all denounced discrimination on the basis of wealth and struck down policies that created classifications based on wealth. In some places, similar rhetoric appeared in \textit{Shapiro}. When the majority and concurring opinions characterized efforts to prevent the in-migration of indigents as unconstitutional, they seemed to be denouncing state efforts to allow the rich to exercise the right of interstate travel but not the poor.\textsuperscript{152} However, the majority of the rhetoric in the decision highlights the distinction between new and old residents as the unacceptable classification created by the waiting periods. While this distinction, too, seems arbitrary, it is notable that the Court did not extend its reasoning on wealth discrimination from \textit{Griffin, Douglas, and Harper} to its ruling here.

Dissenting opinions in \textit{Shapiro} focused on two issues: the role of Congress in authorizing the residency requirements at question in the case and, more relevant to this project, the status of wealth as a suspect classification. Chief Justice Warren’s dissent argued that Congress has the power to impose minimal nationwide residence requirements or authorize states to establish such

\textsuperscript{150} Bussiere, “The Failure,” 115.

\textsuperscript{151} Bussiere, “The Failure,” 120.

requirements and that Congress exercised this power through the enactment of the Social Security Act.\textsuperscript{153} In the Social Security Act, Congress “required those States seeking federal grants for categorical assistance to reduce their existing residence requirements to what Congress viewed as an acceptable maximum,” allowing states to retain some minimal residence requirements.\textsuperscript{154} In Warren’s view, Congress imposed the residence requirement in D.C. and authorized states to impose residence requirements, and Congress had the power to do so having used its commerce power to restrict interstate travel on numerous occasions.\textsuperscript{155} Warren argued that the jurisprudence establishing a right to travel does not support the view that congressional action is invalid if it burdens the right to travel and suggests that the burden on the right to travel caused by residence restrictions is slight compared to congressional reasons for the requirements.\textsuperscript{156}

Justice Harlan’s dissent focused less on the rightful powers of Congress and rather critiqued the opinion of the Court’s application of precedents governing the use of classifications. Harlan’s dissent characterizes the opinion of the court as unduly expanding the doctrine that state statutes creating classifications of a suspect character or classifications that affect fundamental rights deny equal protection of the laws unless justified by a compelling governmental interest.\textsuperscript{157} This doctrine, the “compelling interest” doctrine, has two branches in Harlan’s view. The first branch of the doctrine is that classifications based on suspect criteria must be supported by a compelling interest. This branch of the doctrine was first applied to racial classifications, viewed by the Court as inherently suspect, but was extended to include wealth by Harper and political

\textsuperscript{153} Shapiro v. Thompson, 394 U.S. 618, 644 (1969)
\textsuperscript{154} Shapiro v. Thompson, 394 U.S. 618, 646 (1969)
\textsuperscript{155} Shapiro v. Thompson, 394 U.S. 618, 647-648 (1969)
\textsuperscript{156} Shapiro v. Thompson, 394 U.S. 618, 649 (1969)
\textsuperscript{157} Shapiro v. Thompson, 394 U.S. 618, 655-656 (1969)
allegiance by *Williams v. Rhodes*. In Harlan’s view, the opinion of the Court in this case further extended this list of suspect classifications to include classifications on the basis of recent interstate movement.\(^{158}\) Harlan explicitly denounced these recent developments to the “compelling interest” doctrine – the inclusion of wealth as a suspect classification and the inclusion of classifications based on the exercise of rights like the right to interstate travel.\(^{159}\) The second branch of the doctrine is that a statutory classification is held to the compelling interest test if the classification’s results affect a fundamental right. Harlan argued that the opinion in the court suggests that the compelling interest test is applicable because it impacts access to “food, shelter, and other necessities of life” and the fundamental right to interstate movement.\(^{160}\) Harlan argued that the expansion of rights on the Court’s running list of fundamental rights threatens the rightful application of the equal protection clause.

**The Worthless Right Argument**

In the five cases I’ve presented here, the Warren Court wields at least three kinds of rights-based arguments. The first relevant rights-based argument in the cases I present here is what I will call the worthless right argument. The worthless right argument contends that a given right is worthless for an indigent American – while the indigent may have the right by law, the indigent cannot access, use, or rely on the right because her poverty prevents her from exercising the right. Proponents of this argument rely heavily on the distinction between *de jure* and *de facto* rights and *de jure* and *de facto* discrimination. While an impoverished American has *de jure* rights and faces no *de jure* discrimination in a legal regime that does not enshrine wealth or income requirements for the exercise of constitutional rights in law, impoverished Americans can

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\(^{159}\) *Shapiro v. Thompson*, 394 U.S. 618, 659 (1969)  
be said to lack *de facto* rights and face *de facto* discrimination in that legal regime if the exercise of constitutional rights require that rights-holders have a certain amount of wealth or income to access institutions that provide rights or protect rights or to hold rights-violators accountable. Importantly, in the worthless right argument, the right that is inaccessible or not exercisable to an indigent is thought to be a right that all people ought to have, either because it is a constitutionally enumerated right or because it has been interpreted to be of fundamental importance. In this way, the worthless right differs from arguments that are normatively silent on the right in question but urge equal distribution or provision of the right in question.

The worthless right argument is prominent in *Griffin*, where the opinion of the Court characterized the right to appeal as worthless and meaningless to poor citizens. Under the Court’s interpretation in *Griffin*, the right to appeal cannot be accessed or exercised by poor convicts despite the absence of a specific prohibition in law that bars the indigent from appeal. In a context where the state does not provide convicts with stenographic transcripts of their trial upon request, rich convicts can pay the fee for the transcripts and exercise their right to appeal, whereas poor convicts are prevented from exercising their right to appeal. Effectively, these poor convicts have no right to appeal at all.

The worthless right argument is also prominent in *Douglas*, in which the Court drew many analogies to *Griffin*. In *Douglas*, the opinion of the Court characterized California’s system of appeals as granting the poor the right to a meaningless ritual where the rich have the right to a meaningful appeal. In a context where the state does not appoint counsel for indigents on appeal unless it judges the appeal to have merit, the indigent convict does not have the right to appeal in spite of appellate courts’ skepticism of her case, whereas the rich convict than hire counsel to appeal a case with little prospects.
The worthless right argument also underpins the opinion of the Court and the amicus brief submitted by the American Civil Liberties Union and the Florida Civil Liberties Union in *Gideon*. In the opinion of the Court, Justice Black characterized the right to fair trial as contingent on a defendant's access to counsel. He explains that no ordinary person could be expected to defend himself competently in court because a defendant without counsel lacks the skills and knowledge to make use of his opportunity to be heard in court. Furthermore, the amicus brief submitted by the American Civil Liberties Union and the Florida Civil Liberties Union stated that a criminal trial with no defense attorney is not a hearing at all and that attempts to ascertain guilt or innocence of the accused are meaningless when the accused has no defense attorney. Both the Court and the amicus brief considered the right to a fair trial meaningless without counsel.

The worthless right argument has to grapple with the issue of degree: at what point does an indigent’s right have worth in comparison to a rich man’s right? The amicus brief submitted by state attorneys general in *Gideon* highlights this issue by suggesting that the degree of access to rights related to criminal justice varies with the degree of poverty or wealth of an American. The spectrum of a right’s worth is not the same as a dichotomy between worthless and meaningful rights. The state attorneys’ general insight suggests that, in calling some rights worthless to indigents, the Court is demarcating between worthless and meaningful rights somewhere on the spectrum of a right’s worth. In the above cases, the Court concluded that indigents did not effectively have certain rights on account of their poverty. However, the Court did not – in any of the cases – determine the minimum worth a right must have to satisfy constitutional requirements. In *Griffin*, the Court urged Illinois to ensure indigents had access to appellate review, but the Court did not specify what kind of bare minimum of appellate review
access was constitutionally required. In *Douglas*, Justice Harlan’s dissent asserted that no state could ever “satisfy an affirmative duty – if one existed – to place the poor on the same level as those who can afford the best legal talent available,” begging the question of what level the poor must be brought to in order to satisfy constitutional requirements.\(^\text{161}\) In *Gideon*, the Court set no substantive requirements to govern what the right to counsel should look like, leaving it an open question whether having a publicly appointed attorney who only has five minutes to prepare for a defendant’s trial makes the right to a fair trial meaningful for that defendant. The worthless right argument’s degree issue is a serious one because, if the worthless right argument is incomplete without a consideration of what would make the right worth something, then any legal institution using the worthless right argument will eventually encounter matters that may not be justiciable.

Rawls acknowledges this issue of degree in *Political Liberalism*. He distinguishes between basic liberties, which are essentially political rights, and the worth of basic liberties, acknowledging that “poverty, and the lack of material means generally, prevent people from exercising their rights,” which affects the worth of their liberties.\(^\text{162}\) Rawls’ first principle of justice guarantees that political liberties are secured by their “fair value,” which means that “the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal” so that all citizens have “fair and roughly equal access to the use of a public facility designed to serve a definite political purpose.”\(^\text{163}\)

While Rawls suggests that it is beyond the scope of his project or of philosophical doctrines in general to specify what must be done to secure this outcome, he argues that this roughly equal

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\(^{163}\) Rawls, *Political Liberalism*, 327-328.
access is the threshold states must meet in order to secure the worth of political liberties for those with limited material means.

The Equal Provision of Provided Rights Argument

The second relevant rights-based argument is that, once provided, a right must be provided equally under the equal protection clause of the Fourteenth Amendment. Unlike the worthless right argument, the equal provision of provided rights argument does not argue in support of or in opposition to the provision of a right. In many cases, a right distributed in a way that violates the equal protection clause could just as easily be eliminated as redistributed in order to satisfy constitutional requirements.

Simply put, the equal provision of provided rights argument argues that, if the government chooses to provide a right, it must not create arbitrary classifications with disparate access to that right unless justified by a compelling state interest. Under this argument, a state that decides to provide the right to vote in state elections could not create a classification based on race and allow citizens of some races to access the right to state-level voting while citizens of another cannot. Furthermore, a state that decides to provide the right to vote in state elections could not create a classification based on school district and allow citizens belonging to some school districts to vote in state-level elections but not citizens belonging to other school districts. In these examples, neither race nor school district membership are relevant factors the state has a reasonable interest in considering when providing the right to vote. They create arbitrary classifications that prevent equal enjoyment of the right to vote.

The equal provision of provided rights argument recognizes facially neutral statutes and processes with clearly disparate outcomes as discriminatory. This recognition – and disagreement over it – pervades many of the cases I present here. It first appears in *Griffin*, where the
dissenters stated that appeal was open to all in Illinois but that some people merely lacked the means to avail themselves of that option, but the opinion argued that the facially wealth-neutral law was clearly discriminatory against the poor in its operation. It appeared again in *Douglas*, where Justice Harlan’s dissent criticized the majority for striking down a neutral law that happened to affect the poor more harshly than the rich. It appeared again in *Harper*, where Justice Black’s dissent acknowledged that some would-be voters were too poor to afford to pay poll taxes but denied that this disparate impact on poor voters constituted a violation of equal protection. The equal provision of provided rights argument’s focus on disparate outcomes as discrimination is compatible with the worthless right argument’s focus on *de facto* discrimination. I lay out this emphasis on disparate outcomes as discrimination here because the Warren Court invokes this idea most poignantly in connection with the equal protection clause, and the equal provision of provided rights argument could be described as the embodiment of substantive equal protection.

In the cases I present here, with their specific reference to socioeconomic class, the equal provision of provided rights argument relies on understanding socioeconomic class, wealth, or poverty as an arbitrary classification that illegitimately abridges access to a right provided by the state. At times, the Court invokes concepts like invidious or suspect classifications. According to Michelman, invidious classifications tend to have three characteristics: they are ill-suited to the advancement of a proper goal of the government, they devalue some people’s claims to share in the benefits and burdens of social existence without discrimination, and they injure certain people by implying their inferiority or undeservingness.\(^{164}\) According to Michelman, “suspect” classifications are those “a court will invalidate … unless it is shown to be ‘necessary’ in the

service of some ‘compelling’ state interest.”\textsuperscript{165} Suspect classifications, then, entail “special judicial scrutiny… when invidious classifications are employed, particularly if certain ‘fundamental’ interests are also at stake.”\textsuperscript{166} The inclusion of socioeconomic class as an unacceptable classification was not uncontroversial on the Warren Court. Race is the classic example of a suspect classification, so the Griffin majority’s choice to liken classifications based on poverty to classifications based on race laid the groundwork for classifications based on wealth to be considered suspect. However, Justice Harlan’s dissent in Shapiro explicitly argued against considering wealth to be a suspect classification. Harlan’s dissent seemed to accept more traditional suspect classifications like race, but Harlan condemned requiring classifications based on wealth to be justified by a compelling state interest. Ultimately, later Supreme Court interpretations of Warren Court decisions denied wealth classifications suspect status. In 1973, the Burger Court decided \textit{San Antonio Independent School District v. Rodriguez} by overruling a District Court’s perception that the Warren Court “established wealth as a suspect classification.”\textsuperscript{167}

Because the equal provision of provided rights argument is agnostic, so to speak, on which rights should be provided equally, its utility in the recognition of new classes of rights – like socioeconomic rights – is limited. For example, using the equal provision of provided rights argument against a state law that restricts access to welfare programs to men, to use an obvious example of an arbitrary classification, would not establish a right to welfare programs. It would merely argue that states who choose to establish welfare programs should not discriminate on the basis of gender. The court might intend for the state to respond by creating a more robust welfare

\textsuperscript{165} Michelman, “Foreword: On Protecting the Poor Through the Fourteenth Amendment,” 20.
\textsuperscript{166} Michelman, “Foreword: On Protecting the Poor Through the Fourteenth Amendment,” 20.
program that is accessible to all its residents regardless of gender, but the state could also respond by eliminating its welfare program altogether. Additionally, the equal provision of provided rights argument suffers from a similar issue as the worthless right argument. It begs the question of how equally rights must be provided.

**The Principled Argument**

The third relevant rights-based argument is the principled argument, which seeks to treat all rights or public services in a principled way. Under the principled argument, if there is no principled reason to treat two types of rights or state services differently, then they should be treated alike, even if public opinion or political discourse seek to distinguish between them. In this way, the principled argument is similar to Holmes and Sunstein’s view about positive and negative rights. Holmes and Sunstein seek to deconstruct the perceived division between the two categories of rights by showing that both actually necessitate significant state action and state expenditure and contesting that there is any principled difference that justifies treating them differently.\(^{168}\) In referring to the principled argument as such, I do not seek to deny that the worthless right argument or the equal provision of provided rights argument are based on principled grounds. I merely seek to emphasize the principled argument’s contention that there is no principled difference between welfare services and other state actions. The principled argument is important to this project because it could support treating one’s right to welfare programs and other state services aimed at ameliorating conditions of poverty and wealth disparity like one’s right to more traditional state services like public education. As I shall demonstrate in Chapter 3, it is this principled argument that many scholars employ to argue that the Warren Court recognized socioeconomic rights.

The principled argument is distinct from the worthless right argument and the equal provision of provided rights argument in that it goes the farthest toward recognizing socioeconomic rights as opposed to guaranteeing the worth of existing political and civil rights for people of low socioeconomic status. However, it does share a core characteristic with the equal provision of provided rights argument: antagonism toward arbitrariness. Under the equal provision of provided rights argument, it is impermissible to distinguish between different citizens on arbitrary grounds. Under the principled argument, it is impermissible to distinguish between different state services on arbitrary grounds.

The principled argument is best articulated in Shapiro. The opinion in Shapiro likens access to a state’s welfare programs to access to a state’s public education, public parks, public libraries, and emergency services like protection by the police and fire departments. The opinion seems to suggest that there is no principled reason why welfare programs should be treated differently than these other state services. Whereas the general public and politicians perceive these other state services to be settled entitlements, people’s rights to welfare programs remain contested. Many Americans, when Shapiro was decided, may not have supported an unequivocal right to benefit from a welfare program the way they would have supported an undeniable right to benefit from public education. All these state services – welfare, public education, parks, libraries, and emergency services – are positive rights conferred to the people by the state. As such, they should be treated similarly. If states were not to deny some people access to these other state services, then they should not deny some people access to welfare programs either.
Chapter 3: Law as Integrity

Ronald Dworkin articulates the idea of law as integrity in *Law’s Empire*. He argues that our political life recognizes integrity as a distinct virtue of the law, that integrity is an attractive characteristic of the law, and that integrity constrains adjudication. Here, I will briefly present Dworkin’s arguments regarding law as integrity before using this principle to assess the Warren Court’s jurisprudence on socioeconomic class.

According to Dworkin, our existing political practices accept integrity as a virtue in addition to the virtues of justice and fairness. We require the virtue of integrity because real-world politics is imperfect. Whereas a utopian society would be guaranteed coherence in its state action because all officials would always undertake the perfectly just and fair actions, real-world politics often involves conflict and choice between the pursuits of justice and fairness, and the virtue of integrity helps the state navigate conflicts between the three virtues to create a body of law and a history of state actions that is as morally cohesive as possible.\(^{169}\)

Dworkin proves that our existing political practices pursue integrity as a distinct virtue by examining our politics’ response to checkerboard solutions, laws that treat similar incidents differently on arbitrary grounds in order to reflect disagreements among members of the political community. While Dworkin recognizes that checkerboard solutions are accepted when they pertain to issues of little moral import, he asserts that we reject checkerboard solutions when matters of principle are at stake; on these matters, we allow each point of view to participate in deliberation, but we demand that the decision settle on a coherent principle.\(^{170}\) We demand that

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\(^{170}\) Dworkin, *Law’s Empire* 179.
compromises occur externally – in the decision about which scheme of justice to adopt – rather than internally – in the adoption of a compromised scheme of justice.\textsuperscript{171}

According to Dworkin, neither fairness nor justice can explain why we reject checkerboard solutions on matters of principle, but integrity can. The virtue of fairness suggests that each person in the political community should have a roughly equal contribution to state decisions.\textsuperscript{172} Dworkin argues that the pursuit of fairness alone would compel the state not to impose the majority’s view on the whole political community as if it were unanimous but rather to engage in “trades and compromises so that each body of opinion is represented, to a degree that matches its numbers, in the final result,” which would create checkerboard solution.\textsuperscript{173} Dworkin argues that fairness cannot be the reason we reject checkerboard solutions on issues of principle because checkerboard solutions are arguably fairer than winner-take-all rule insofar as it would distribute political power to those with minority views as well.\textsuperscript{174} The virtue of justice is concerned with consequences – Dworkin states that a political decision is unjust if it denies people something they ought to have, regardless of how fair the procedure resulting in the outcome was.\textsuperscript{175} Dworkin argues that considerations of justice do not give us reasons to reject checkerboard solutions in general, even though justice might motivate us to reject the outcome of a specific compromise on a specific issue. Unlike fairness and justice, Dworkin argues, integrity can explain why we reject checkerboard solutions. A state that comes to internal compromises on issues of moral import acts in an unprincipled way – in other words, a state that enacts checkerboard solutions on these issues must endorse some principles to justify some of its

\textsuperscript{171} Dworkin, \textit{Law’s Empire} 179.
\textsuperscript{172} Dworkin, \textit{Law’s Empire}, 178.
\textsuperscript{173} Dworkin, \textit{Law’s Empire}, 178.
\textsuperscript{174} Dworkin, \textit{Law’s Empire}, 179.
\textsuperscript{175} Dworkin, \textit{Law’s Empire}, 180.
actions but endorse conflicting principles to justify its other actions. This makes the law lack integrity insofar as it would be morally incoherent.

Dworkin argues that our recognition of integrity is a good thing because political societies with integrity are communities with “moral authority to assume and deploy a monopoly of coercive force.” This has practical benefits to the administration of a state. A political society with integrity has an efficient body of law. When people understand that there are coherent principles that undergird explicit rules and past political decisions, they can understand what those principles might mean in new circumstances without the constant need for new detailed legislation or adjudication. When the law has integrity, “public standards can expand and contract organically,” whereas a body of law without integrity would not be internally coherent enough to allow the public to competently extrapolate from existing rules to understand what the law would demand in new situations.

Dworkin argues that integrity restricts adjudication by requiring judges “to treat our present system of public standards as expressing and respecting a coherent set of principles and, to that end, to interpret these standards to find implicit standards beneath and between the explicit ones.” In adjudication, upholding integrity is distinct from pursuing consistency or merely conforming to precedent. If precedent arbitrarily treats similar situations differently, then integrity demands that judges overturn precedent that makes the law speak in an unprincipled way. Dworkin describes adjudication with integrity as writing law through a chain novel, a practice of writing in which each author interprets existing chapters in order to write a

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177 Dworkin, *Law’s Empire*, 188.
178 Dworkin, *Law’s Empire*, 188.
179 Dworkin, *Law’s Empire* 188.
new chapter and all the authors share the goal of creating a single novel with internal coherence by the end.\textsuperscript{182} When a judge adjudicates, she reviews what the law has already said and tries to come up with an interpretation that can explain existing law. She is constrained by integrity to give coherence to the law, so she cannot attribute an interpretation to the law that does not fit and use this interpretation to legislate from the bench. She is involved in a serious shared project of trying to create a body of law that has integrity, and this requires her to understand the principles articulated in existing law so that she can ensure that the principles articulated in new law do not conflict with other parts of the law.

\textbf{Narrow Issues of Law as Integrity}

Integrity demands coherence from the law. In a narrow sense, integrity demands that different cases related to the same issue be treated in a morally consistent way. In a broad sense, integrity demands that the body of law espouse principles that do not conflict with one another. If the Warren Court invoked all three arguments I presented in Chapter 2 – the worthless right argument, the equal provision of provided rights argument, and the principled argument – in its decisions regarding socioeconomic class, then integrity in the narrow sense demands that those arguments have coherence when taken together.

While the worthless right argument and the equal provision of provided rights argument differ in several ways, I argue that they have moral coherence when taken together and, therefore, can coexist in law without violating integrity. The worthless right argument and the equal provision of provided rights argument are both concerned with \textit{de facto} discrimination and the disparate outcomes that result from facially neutral laws. Both arguments recognize that formal equality is not enough and demand some effort toward substantive equality, though both

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\textsuperscript{182} Dworkin, \textit{Law's Empire}, 229.
arguments are susceptible to the challenge that determining the minimum required effort toward substantive equality is difficult. This effort for substantive equality is a clear principled convergence between the two arguments. A body of law that operates with the aim to secure substantive equality could incorporate both the worthless right argument and the equal provision of provided rights argument.

The worthless right argument and the equal provision of provided rights argument have two main differences, but I argue that they do not necessarily contradict each other in principle. The first difference is that the worthless right argument takes the rights in question to be necessary, whereas the equal provision of provided rights argument is agnostic on whether the right in question should be provided. Recall that the worthless right argument is most often invoked in relation to basic political and civil rights, whereas the equal provision of provided rights argument is invoked in relation to rights the state has affirmatively established. Therefore, while the two arguments treat rights differently, there may be a principled reason for doing so: some rights are inviolable insofar as they are the basic political and civil liberties inherent to the state, while some rights were created at the state’s discretion. The second difference pertains to the different obligations of the state when the arguments are invoked. In response to the worthless right argument, the state must guarantee the worth of political and civil rights for the poor. Under the equal provision of provided rights argument, the state must not continue its use of arbitrary classifications, but it can do so by eliminating the classification or by ceasing to provide the right. This difference, too, can be accounted for if we accept a principled reason for treating the worthless rights argument’s political and civil rights from the equal provision of provided rights argument’s additional rights. Under this principled distinction, it makes sense
that the basic political and civil liberties inherent to the state cannot simply be done away with, while additional rights could be.

Having established that the worthless right argument and the equal provision of provided rights argument can coexist under the narrow requirements of law as integrity, I argue that the core insight of the principled argument, too, can have coherence when taken together with the other two arguments. The principled argument shares a core tenet with the equal provision of provided rights argument: antagonism toward arbitrary distinctions. This idea in and of itself aligns with the requirements of law as integrity. Integrity demands principled coherence, so things that are similar and that implicate the same principles will be treated similarly in a body of law that has integrity. The principled argument’s core insight is that, unless there is a principled reason to treat two types of rights or state services differently, they should be treated alike. This insight does not necessarily conflict with the worthless right argument or the equal provision of provided rights argument. However, its coherence with the other two arguments depends on our belief that there is a principled reason to differentiate between rights that are basic and inviolable and rights that have been affirmatively recognized by the state. If we recognize that principled difference, then the principled argument functions like an extension to the equal provision of provided rights argument – if rights are established by the state, they have to be provided equally to different citizens and they have to be treated like other rights established by the state or done away with. This interpretation of the principled argument accommodates the Warren Court’s reasoning linking services like welfare programs to services like public education without supporting some scholars’ view that the Warren Court creates an undeniable constitutional right to welfare.
If we accept, as I think the Warren Court does, that there are principled differences between different types of rights, namely that some rights are basic, inviolable political and civil rights and some rights have been affirmatively established by the state, then the core insights of all three arguments can coexist in the law without violating law as integrity. If we do not believe there are legitimate grounds to distinguish between different kinds of rights, then the rights-based arguments related to socioeconomic class advanced by the Warren Court conflict.

Broad Issues of Law as Integrity

As I highlighted in Chapter 1, many advocates for socioeconomic rights characterize the Warren Court as recognizing constitutional welfare rights. Here, I will present some of this literature and argue that this literature mischaracterizes the actions of the Warren Court. The Court did not explicitly recognize socioeconomic rights, and subsequent cases that cite Warren Court decisions did not interpret the Warren Court as recognizing socioeconomic rights. Furthermore, this mischaracterization of the Warren Court is problematic because it suggests that the Warren Court violated the demands of law as integrity. Under a proper understanding of the Warren Court, the Court upheld law as integrity in important ways.

Many scholars characterize the Warren Court as either laying the legal groundwork for the recognition of constitutional socioeconomic rights or coming close to recognizing socioeconomic rights itself. Bridgette Baldwin, for example, cites Shapiro and Goldberg v. Kelly to argue that the Warren Court set up the recognition of socioeconomic rights. Baldwin argues that, while Shapiro’s explicit ruling was more limited, the decision “hinted at an affirmative duty for states to redress economic inequalities,” a duty that is in essence a welfare right. Baldwin

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suggests that Shapiro laid the groundwork necessary for Goldberg, which came before the Burger Court in 1970, to make welfare benefits a legal entitlement. She frames Goldberg’s understanding of welfare as a property right as a continuity from the Warren Court’s liberal activism regarding welfare. Baldwin’s analysis concludes by stating that Shapiro, and its extension through Goldberg, “came pretty close to nationalizing AFDC and establishing a right to welfare.”

Elizabeth Bussiere also argues that the Warren Court nearly, could have, and perhaps should have recognized socioeconomic rights. She chronicles the efforts of welfare rights advocates during the Warren Court era, arguing that the welfare rights movement had well-founded optimism that the Warren Court would recognize socioeconomic rights. Bussiere suggests that the Warren Court would have established constitutional rights to welfare but for mistakes in strategy on the part of the welfare rights movement. She characterizes Shapiro as a particularly difficult case, citing the fact that it had to be argued before the Court twice. Bussiere implies that, had strategic litigators presented the Warren Court with a simpler case that solely implicated welfare rights instead of Shapiro, the Court would have been likely to recognize a constitutional right to welfare. Lucas A. Powe, Jr. contends that the Court’s progress started even earlier than Shapiro, stating that “Griffin and Gideon were first steps of what proved to be an unmistakable, albeit ultimately limited, effort to constitutionalize the welfare state, using coerced wealth transfers to make the lives of the least fortunate better.”

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186 Baldwin, “In Supreme Judgment of the Poor,” 38.
These scholars acknowledge that, while the Warren Court may have laid groundwork that could have enabled subsequent recognition of socioeconomic rights, it did not itself recognize these rights in its decisions.

Other scholars go further, characterizing the Warren Court as having recognized new rights, including socioeconomic rights. David Luban argues that the Warren Court’s creation of new rights is its most important legacy.\(^ {192} \) According to Luban, the Warren Court engaged in the recognition of additional rights in order to secure what it saw as existing rights.\(^ {193} \) He presents the following way of formulating the Warren Court’s route to the recognition of new rights: “any right that is a pragmatically necessary condition for the protection of a constitutional right is itself a constitutional right.”\(^ {194} \) At this juncture of his argument, Luban acknowledges that there is serious disagreement over whether the recognition of new rights in order to protect primary rights includes the recognition of socioeconomic rights to protect some political or civil rights, citing Michelman as one who argues in the affirmative.\(^ {195} \) Michelman argues that there is a constitutional right to welfare at work in the Warren Court’s relationship to socioeconomic class despite the Court’s effort to obscure the true grounds of their rulings.\(^ {196} \) He argues that the Court produced outcomes that were friendly to the welfare rights cause despite placing “the supportive decisions on grounds other than welfare rights.”\(^ {197} \) Michelman argues that it must have been a belief in socioeconomic rights that undergirded the Court's jurisprudence because the alternate grounds stated by the Court were unsatisfactory.\(^ {198} \) Laurence H. Tribe advances a similar view.

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Tribe argues that the Court’s decisions in cases like 
Shapiro “may well reflect an unarticulated perception that there exist constitutional norms establishing minimal entitlements to certain services.” 199 He agrees with Michelman’s contention that the grounds cited by the Warren Court in place of explicit recognitions of socioeconomic rights do not adequately explain its rulings, arguing that a right to welfare supports the outcome in Shapiro better than the right to interstate travel. 200

These characterizations of the Warren Court do not uphold law as integrity. They cast the Warren Court as recognizing new constitutional rights in a deceitful way. In recognizing new constitutional rights – socioeconomic rights like the right to welfare, for example – the Warren Court would have been acting inconsistently with previous decisions without an integrity-based reason for doing so. These scholars do not argue that the U.S. Constitution, properly understood, enumerated socioeconomic rights. They seem to believe that it would be politically desirable for the list of rights protected under constitutional law to include socioeconomic rights. While such a condition might be politically desirable, it would have been a serious departure from existing constitutional law for the Warren Court to establish constitutional socioeconomic rights. While Dworkin’s law as integrity allows for adjudication of new cases to overturn precedent, law as integrity excuses departing from precedent only when doing so eliminates conflicting principles in the law and makes the law more coherent. It is not clear that the Warren Court would have been doing so had it established a constitutional welfare right. If the Warren Court thought it would be advancing the law’s internal coherence by introducing new constitutionally protected

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socioeconomic rights, then it is unlikely that the Court would have done so in the deceitful manner Michelman and Tribe describe.

However, these sources mischaracterize the Warren Court. Michelman and Tribe’s claims actually require us to believe that the Warren Court was deceptive in its rulings by citing legal reasoning that did not actually correspond with the true grounds on which the cases were decided. The fact is that Shapiro recognized a fundamental right, but that right was the right to interstate travel rather than a right to welfare. Furthermore, Shapiro struck down classifications between new and old residents seeking to access welfare programs rather than classifications between the rich and the poor. I recognize that a similar outcome could have been achieved in the case had the Court grounded its decision on socioeconomic rights. I also recognize, as I include in my analysis of Shapiro in Chapter 2, that some of the Court’s rhetoric gestures toward more socioeconomic rights grounds for the decision than its stated grounds. These details are, however, irrelevant to the case’s holding or the Warren Court’s recognition of socioeconomic rights. All the literature agrees that Shapiro is the farthest the Warren Court goes toward recognizing socioeconomic rights, specifically the right to welfare programs. My point is, while that may be true, Shapiro itself does not go very far. Furthermore, subsequent Supreme Court cases that cited Warren Court rulings did not interpret the Warren Court as establishing socioeconomic rights in American constitutional law. In 1972, the Warren Court decided Lindsey v. Normet, which concerned the framing of shelter as a fundamental interest.\textsuperscript{201} The appellants in Lindsey, month-to-month tenants in a building they believed was kept in substandard conditions, argued that “the need for decent shelter and the right to retain peaceful possession of one’s home are fundamental interests which are particularly important to the poor.”\textsuperscript{202} This argument seems

\textsuperscript{201} Lindsey v. Normet, 405 U.S. 56, 73 (1972)  
\textsuperscript{202} Lindsey v. Normet, 405 U.S. 56, 73 (1972)
to rely on a positive right to shelter, a right often included in constitutions that enumerate socioeconomic rights. If, as Michelman and Tribe argue, the Supreme Court had sneakily adopted the view that Americans have constitutional socioeconomic rights, then this would likely include the right to shelter. However, because the Warren Court had not established constitutional socioeconomic rights like the positive right to housing, the subsequent Burger Court did not have precedent to accept appellants’ contentions. The opinion of the Court in *Lindsey* was sympathetic to the importance of housing, stating “we do not denigrate the importance of decent, safe, and sanitary housing.” Ultimately, though, the Burger Court acknowledged that “the Constitution does not provide judicial remedies for every social and economic ill” and did not “perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent.”

As I have demonstrated, readings of the Warren Court as establishing constitutional socioeconomic rights are inaccurate. As the cases I present in Chapter 2 demonstrate, a more accurate understanding of the Warren Court highlights its role in securing the worth of political and civil rights for people of low socioeconomic class. On this understanding of the Warren Court’s relationship to socioeconomic class, I argue that the Warren Court upheld the principle of law as integrity in two ways.

First, the Warren Court upheld the principle of law as integrity by taking seriously the rights promised to citizens. In the cases I present here, the Warren Court sought to guarantee the worth of political and civil rights for people of low socioeconomic class, ensuring that the rights

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204 *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)

promised to all Americans are substantive for the poor rather than merely formal. If a body of law with integrity has principled reasons to protect political and civil rights, then its principles require not only that the rights exist but also that they have meaning.

Second, in concerning itself with the substance of rights and with substantive equality, the Warren Court issued decisions consistent with the existing framework of rights in American constitutional law. The Warren Court’s relationship to socioeconomic class and its efforts to give meaning to the political and civil rights of the poor can be interpreted as continuities of cases like *Yick Wo v. Hopkins* and *Powell v. Alabama*. *Yick Wo* concerned formal versus substantive equality in the provision of a right, and *Powell* concerned the substantive meaning of a right. This continuity helps us understand that the Warren Court did not invent new rights or even invent new principles, actions that would not uphold the virtue of integrity. Rather, the Warren Court adjudicated in a way aligned with Dworkin’s judge as a chain novelist – they identified principles articulated elsewhere in the law, and they extended them to the issue of socioeconomic class to bring more coherence to the law.

In *Yick Wo*, the Supreme Court considered an 1880 ordinance from the city of San Francisco that required all laundry businesses operated in wooden buildings to request a permit from city supervisors, who had complete discretion over who would be issued a permit.\(^{206}\) As the opinion of the Court highlighted, the supervisors’ discretion was “purely arbitrary, and acknowledge[d] neither guidance nor restraint.”\(^{207}\) This discretion resulted in the rejection of permit requests from over 200 Chinese petitioners, while 80 petitioners who were not Chinese

\(^{206}\) *Yick Wo v. Hopkins*, 118 U.S. 356, 366-367 (1886)

\(^{207}\) *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886)
were granted permits.\textsuperscript{208} As early as 1886, the Court articulated the importance of substantive equality in the provision of rights:

“Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”\textsuperscript{209}

The Warren Court can be seen as embracing the principle laid out by \textit{Yick Wo} and applying the notion that facially impartial laws with disparate impact are in violation of the Constitution to disparate impacts faced by people of low socioeconomic class.

In \textit{Powell v. Alabama}, the Supreme Court reviewed the conviction of several black men on rape charges with death sentences. Alabama’s state constitution states that in all criminal prosecutions the accused has the right to the assistance of counsel, and Alabama state statutes require courts to appoint counsel for defendants who are unable to hire counsel on their own in capital cases.\textsuperscript{210} While the court complied with the letter of the law, it did not grant the defendants a meaningful right to the assistance of counsel. As the opinion of the Court highlighted, “until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants.”\textsuperscript{211} Counsel was appointed immediately before proceedings started, the attorneys did not consult with their clients, and did very little to represent them. In the opinion of the Court, this constituted “little more than an expansive gesture, imposing no substantial or definite obligation upon anyone” to defend the accused, and

\textsuperscript{208} \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 374 (1886)
\textsuperscript{209} \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 373-374 (1886)
\textsuperscript{210} \textit{Powell v. Alabama}, 287 U.S. 45, 59-60 (1932)
\textsuperscript{211} \textit{Powell v. Alabama}, 287 U.S. 45, 56 (1932)
the “defendants did not have the aid of counsel in any real sense” because they did not prepare for the trial with the aid of counsel.212 Powell, an obvious precursor to Gideon, in many ways articulated the principle that a right must not just be a formal right but must have worth. Read this way, the Warren Court can be seen as embracing the principle laid out by Powell and extending its emphasis on worth to different rights to bring coherence to the law.

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212 Powell v. Alabama, 287 U.S. 45, 59-60 (1932)
Conclusion

Through its decisions in cases like *Griffin v. Illinois, Gideon v. Wainwright, Harper v. Virginia State Board of Elections*, and *Shapiro v. Thompson*, the Warren Court sought to guarantee the worth of political and civil rights for the poor. Existing principles in the law, articulated by earlier cases like *Yick Wo v. Hopkins* and *Powell v. Alabama*, emphasized the importance of rights being substantive rather than merely formal and the importance of rights being distributed in a substantively equal way. Driven by these principles, the Warren Court addressed the de facto rights of indigents and the disparate impacts of facially neutral laws on the poor’s access to rights. In this way, the Court can be seen as embracing law as integrity and bringing more coherence to the law by ensuring that socioeconomic class was not treated arbitrarily differently from other factors that might affect people’s substantive access to their rights.

Is it desirable to frame the Warren Court as recognizing socioeconomic rights? Maybe. We have many reasons to value socioeconomic rights. Socioeconomic rights seek to ensure that all people in a political community have access to basic goods and services that furnish conditions of human dignity. This in itself is an admirable goal. Given the reality that economic inequality often sows political inequality, socioeconomic rights are also one way to ensure that citizens do not face material deprivation that would prevent them from participating in the political community or impede their access to political and civil rights. Perhaps framing the Warren Court as recognizing socioeconomic rights helps the cause of those who advocate for the United States to adopt and protect socioeconomic rights today. Claiming that the highest body in the judicial branch of the United States actually embraced socioeconomic rights in the 1960s might make the argument that we should implement socioeconomic rights now seem less new,
less radical, or less out of tune with the traditions of American constitutional law. I am
sympathetic to this instrumental value of characterizing the Warren Court as having embraced
welfare rights – though I make no claim to know what motivates scholars who characterize the
Court that way. However, even if it is politically desirable for the advancement of admirable
goals to characterize the Warren Court as recognizing socioeconomic rights, these
characterizations remain inaccurate.

But this thesis does not seek to dismiss claims that the Warren Court did important work
to improve the lives of the American poor. Guaranteeing the worth of traditional political and
civil rights is an important goal. In fact, if Sitaraman’s characterization of the structure of the
United States government and its specific vulnerability to political inequality is correct, then
guaranteeing the worth of political and civil rights for the poor is crucial. Recall that Sitaraman
describes the American Constitution as a middle-class constitution. Our middle-class constitution
does not bake socioeconomic classes into the structure of the government or design the state in a
way that balances the political will of the rich against the political will of the poor through
opposition. Its political equality depends on the relative economic equality of the United States.
When economic equality erodes, American political equality is in jeopardy. Sitaraman points to
several legislative projects the United States could undertake to rebuild the middle class and help
our middle-class constitution function.213 Guaranteeing the worth of rights for the poor is another
apt strategy to save our middle-class constitution. Returning to the Warren Court’s arguments,
taking the worthless right argument and the equal provision of provided rights argument
seriously, could give rise to a judicial strategy to ameliorate the political impacts of rising
economic inequality.

213 Sitaraman, *The Crisis of the Middle-Class Constitution*, 284-293.
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*Gideon v. Wainwright*, 372 U.S. 335 (1963)


Griffin v. Illinois, 351 U.S. 12 (1965)


Lindsey v. Normet, 405 U.S. 56 (1972)


*Powell v. Alabama*, 287 U.S. 45 (1932)


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*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)